



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 438 OF 2010

JOAN WANJRU THAIRU & 8 OTHERS.....CLAIMANT

versus

- 1. BATA SHOE COMPANY (KENYA) LTD**
2. 4M ENTERPRISES.....RESPONDENTS

JUDGMENT

1. The 9 Claimants filed a Memorandum of Claim on 23rd April 2010 seeking resolution of a dispute they framed as **unfair termination of the Claimants from their Employment with the Respondents**. The Claimants claimed they were declared redundant. They claimed to be members of the Kenya Shoe and Leather Workers Union which had a Collective Bargaining Agreement with the 1st Respondent Bata Shoe Company (Kenya) Limited. The Memorandum of Claim was verified by an Affidavit of Hallun Afande the 6th Claimant herein. A letter of Authority to Sue signed by the 1st to 5th and 7th to 8th Claimants was attached bearing signatures of the Claimants aforesaid. Annexed to the Claim were various documents including copies of employees Cards, payslips, letters from the Respondents and documents evincing some nexus between the Claimants and the Respondents. They also attached receipts for payment to the Union. Their individual claims were tabulated in an appendix attached to the Claim and ranged from service pay to house allowance, leave allowance, travelling allowance, compensation, rest days, arrears of wages, one month's notice and public holidays.
2. The 1st Respondent filed its Memorandum on 6th August 2010. In it, the 1st Respondent denied that the Claimants were its employees during the period in question. The 1st Respondent averred that it entered into a contract for provision of services with the 2nd Respondent whereby the 2nd Respondent agreed to supply the 1st Respondent with services upon payment of professional fees and the 1st Respondent agreed to outsource from the 2nd Respondent manpower services. The outsourced workers were recruited, remunerated, supervised and disciplined by the 2nd Respondent 4M Enterprises Limited. They were engaged in stitching the canvas shoes uppers. In December 2009, the 1st Respondent terminated the Contract with the 2nd Respondent thereby effectively bringing to an end the relationship with the 2nd Respondent.
3. The 2nd Respondent filed a Memorandum of Defence on the same day as the 1st Respondent on 6th August 2010. The 2nd Respondent admitted the Claimants were its employees save that the nature of the employment was casual and subject to a contract of supply of manpower between the Respondents. The 2nd Respondent admits it recruited the Claimants but denies it was responsible for the calculation of wages as alleged in the Memorandum of Claim. The 2nd Respondent averred

that the Claimant's wages were computed by the 1st Respondent who subsequently made payments to the Claimants fortnightly. The 2nd Respondent received a commission from the total wages and all records of wages were maintained by the 1st Respondent. The Claimants worked within the 1st Respondent's premises and under the direct instruction of the 1st Respondent's managers and supervisors to produce products for the 1st Respondent. The contract for supply of labour was terminated on 31st December 2009 effectively terminating the Claimants employment. The 2nd Respondent was not aware that the Claimants services were transferred to a new company known as Foot Plus as alleged in the Memorandum of Claim. The 2nd Respondent denied the Claimants were declared redundant and averred that their dues were paid. It claimed it was not a party to the CBA between the 1st Respondent and the Kenya Shoe and Leather Workers Union.

4. The Claim was handled by the predecessor of this Court (Hon. Chemmutut) and the award was to be on notice. The parties filed their final submissions. The Claimants filed on 1st February 2011, the 2nd Respondent filed on 2nd February 2011 and the 1st Respondent filed their submissions on 23rd May 2013.
5. I have carefully considered the pleadings of parties, the documents filed in support of their rival positions, the authorities cited and the law in coming to this decision.
6. The 2nd Respondent admitted in its pleadings that the Claimants were its employees. They only stated that the nature of the employment was casual and subject to a contract of supply of manpower between the Respondents. The Contract was exhibited. The 2nd Respondent admits it recruited the Claimants but denies it was responsible for the calculation of wages. The Court notes that it seems there were unpaid NSSF and NHIF dues as exhibited in the documents of the 2nd Respondent marked as Appendix C. The Respondents are by law required as employers to deposit with NSSF and NHIF all statutory deductions in respect of their employees.
7. On 12th July 2012, The Statute Law (Miscellaneous Amendments) Act 2012 was published as Kenya Gazette Supplement No. 72 (Acts No. 12). In it, Section 55(2) of the Labour Institutions Act, 2007 (Act No. 12 of 2007) was amended. The amendment was as follows:- Insert the words "unless the person is registered under this Act" immediately after the words "No person shall". The relevant portion of Section 55(2) of the Labour Institutions Act previously provided as follows:-

(2) No person shall-

(a) carry out business as an employment agency; or

8. After the amendment, the Section read as follows:-

(2) No person shall unless the person is registered under this Act

(a) carry out business as an employment agency; or

9. The change in the law came in 2012. The contract between the 1st and 2nd Respondent was entered in 2009. At the time, there was no legal provision permitting what was done by the Respondents.
10. The Claimants have not proved their entitlement to payment of house allowance, leave allowance, travelling allowance, rest days, arrears of wages, and public holidays. They did not prove their entitlement to those sums. Some of the documents annexed to the Claim were clearly not those of the Claimants and had no probative value whatsoever.
11. The Claimants were engaged by the Respondents and at the material time were purportedly under

the contract of provision of manpower services. I hold and find that they were employees of the 2nd Respondent which was contracted by the 1st Respondent to employ them. There is vicarious liability between the 2 respondents. They were terminated abruptly without notice. They are each entitled to notice pay. They are also entitled to compensation for 6 months each. The award for each of them as against the 1st and 2nd Respondent jointly and severally, is as follows:-

a. Joan Wanjiru Thairu –

- i. Kshs. 8,320/= (notice 1 month)
- ii. Kshs. 49,920/= (compensation 6 months salary)

Total **Kshs. 58,240/=**

b. Racheal Wambuku Mwiwaki

- i. Kshs. 13,416/= (notice 1 month)
- ii. Kshs. 80,496/= (compensation 6 months salary)

Total **Kshs. 93,912/=**

c. John Mbachio Mungai

- i. Kshs. 13,416/= (notice 1 month)
- ii. Kshs. 80,496/= (compensation 6 months salary)

Total **Kshs. 93,912/=**

d. James Mungai Kimani

- i. Kshs. 13,416/= (notice 1 month)
- ii. Kshs. 80,496/= (compensation 6 months salary)

Total **Kshs. 93,912/=**

e. Samuel Gechuru Amos

- i. Kshs. 13,416/= (notice 1 month)
- ii. Kshs. 80,496/= (compensation 6 months salary)

Total **Kshs. 93,912/=**

f. Hallun Afande Mugutusi

- i. Kshs. 16,666/= (notice 1 month)
- ii. Kshs. 99,996/= (compensation 6 months salary)

Total **Kshs. 116,662/=**

g. Eliud Yabwetsa Lugutyani

- i. Kshs. 16,666/= (notice 1 month)
- ii. Kshs. 99,996/= (compensation 6 months salary)

Total **Kshs. 116,662/=**

h. Douglas Kaminjo Wandarua

- i. Kshs. 16,666/= (notice 1 month)
- ii. Kshs. 99,996/= (compensation 6 months salary)

Total **Kshs. 116,662/=**

i. Boniface Ngugi Wanjiru

- i. Kshs. 13,416/= (notice 1 month)

ii. Kshs. 80,496/= (compensation 6 months salary)

Total **Kshs. 93,912/=**

12.They will also have costs and interest.

It is so ordered.

Dated and delivered at Nairobi this 5th day of **July** 2013

Hon. Mr. Justice Nzioki wa Makau

Judge